Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of
)
Implementation of Section 621(a)(1) of the Cable)
Communications Policy Act of 1984 as amended) MB Docket 05-311
By the Cable Television Consumer Protection and)
Competition Act of 1992)
)

REPLY COMMENTS OF SOUTHEAST
MICHIGAN MUNICIPALITIES

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SUMMARY

There Reply Comments from many of the 42 communities in southeastern Michigan, where Ameritech New Media Enterprises, Inc., [1] readily obtained competitive franchises less than 10 years ago offers a perspective on cable television competition shared by few others. Ironically, rapidly following its acceptance these franchises, Ameritech New Media, a wholly-owned subsidiary of Ameritech, was acquired by SBC, which just as rapidly sold them to WideOpenWest. SBC has since merged with and now operates as AT&T. Even more ironic is the fact that many of these suburban Detroit communities were then served by Comcast, TCI or Continental Cablevision. The TCI and Continental systems ended up getting purchased by AT&T Broadband, which sold them all to Comcast.

[1] . The company quickly shortened its name to Ameritech New Media, Inc. ANME entered the competitive marketplace sounding too much like "ENEMY," according to a senior company executive and her attorneys, who deny initially harboring any such intention when beginning their competitive assault on the cable television marketplace.

Joining these Reply Comments are several other southeastern Michigan communities, which were passed over, for a variety of reasons. The primary obstacle was not the need to negotiate municipal franchises. Rather, Ameritech New Media simply came to them seeking franchises too late before SBC's purchased Ameritech and brought a halt to any further expansion. In fact, SBC withdrew from the last franchise obtained by Ameritech New Media where construction had not yet begun.

Together, Southeastern Michigan Communities vividly illustrate in these Reply Comments that the requirement of local government franchising is no obstacle to the build-out of competitive cable television systems here and across the United States. The supreme irony of the experience of these Southeastern Michigan Communities is that one of the companies arguing against having to get municipal franchises already had them here and spit them out. Today, the company that acquired these franchises and tossed them away is the incumbent local exchange carrier in southeastern Michigan, AT&T. Moreover, the existence of these competitive franchises makes suburban Detroit an unlikely target for early entry by AT&T into an already high-competitive cable television marketplace, with WOW, Comcast, and the satellite providers all jostling for subscribers every day. Consequently, the Southeastern Michigan Communities filing these Reply Comments do so knowing that whatever changes come to municipal cable television franchising, by the adoption of any new regulations under § 621(a)(1) of the

Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection Act of 1992, their residents will not be getting a third competitive provider any time soon.

INTRODUCTION

These Reply Comments join and adopt by reference Comments filed by the National Association of Telecommunications Officers and Advisors, the National League of Cities, the National Association of Counties, the U. S. Conference of Mayors, the Alliance for Community Media and the Alliance for Communications Democracy dated February 13, 2006. These Reply Comments also join and adopt by reference Comments filed by the Michigan Municipal League, Michigan Townships Association, Michigan Coalition to Protect Public Rights-of-Way and the Michigan National Association of Telecommunications Officers and Advisors dated February 13, 2006.

I. THE HIGHLY-COMPETITIVE MARKETPLACE OF SOUTHEASTERN MICHIGAN ILLUSTRATES WHERE AN UNREGULATED COMPETITOR, SUCH AT&T's PREDECESSORS, SBC AND AMERITECH, WILL DECIDE TO OFFER COMPETTIVE VIDEO SERVICES

Introduction

These Reply Comments are filed by the Cities of Sterling Heights, Madison Heights, Troy, St. Clair Shores, Mount Clemens, Southgate, Allen Park, Eastpointe, Utica, Wayne, Dearborn Heights, Lincoln Park, Plymouth, Fraser, Warren, the Charter Townships of Harrison and Shelby and the Township of Grosse Ile, which are among the 43 communities across suburban metropolitan Detroit that successfully negotiated overbuild cable television franchises with Ameritech New Media within a period of about 43 months beginning in 1995. [2] Some negotiations consumed just a few months from the beginning to final adoption. Others extended for a year or more. All but one of the 43 franchises [3] negotiated was successfully built and cable television service launched against fully-developed 15 to 20-year old incumbent systems then owned by Continental Cablevision, TCI, and Comcast and later by Media One, AT&T Broadband, all of which are now owned by Comcast. In a few of these communities, Lincoln Park and Troy, in

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[2] . Ameritech New Media concluded not just these 43 but about 120 others during this period in suburban Cleveland, Columbus and Chicago, too, using the same three-man team of attorneys. It was a shoestring operation throughout its engagement with municipal franchising.

[3] . The last franchise awarded, by Macomb Township, was withdrawn by SBC when it acquired Ameritech and its wholly-owned subsidiary, Ameritech New Media.

which TCI owned the franchises, Ameritech New Media quickly captured upwards of 60 percent or more of the market. [4] In others, it struggled against remarkably intense anti-competitive tactics. [5] Its presence, the 750 MHz, 250 home per node, industrial quality system they installed and the high standard of customer service it offered wrought significant changes in the marketplace. [6] Today, in most of these communities, Ameritech New Media's buyer, WOW today serves probably about 33 percent of the market. Recently, its majority shareholders found buyers for their control by Avista Capital Partners, Northwestern Mutual Life Insurance Company and Standard Life Investments (USA) raising the per subscriber price from $741 in 2001 to $2,200 today, according to estimates reported by *The Multichannel News.*

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[4] . The TCI systems in Lincoln Park and Troy had not be upgraded, suffered terrible customer service, and their managers had little corporate support for engaging Ameritech New Media, which, recognizing their weaknesses, gained franchises there early on and pulled all of the sales and marketing efforts out of other communities when launching there. Ameritech New Media was most successful, at launch in Lincoln Park and Troy. Once established, the status quo of the competitive market here has stabilized in these communities – not considering the 16 percent apparently opting for satellite video.

[5] . The City of Fraser, Michigan, was the fifth community granting a franchise to Ameritech New Media. Comcast was the incumbent provider there. In the few weeks after completion of the 12-month long build-out of this 4-square mile city with a population of 15,000, at an advisory cable commission meeting one member mentioned that he had been receiving the entire Comcast line-up for free during the last year, even though he only subscribed to a lower tier. One by one the other commission members then described how they, too, had been getting all services, premium and satellite from Comcast for many months for free. Comcast later explained that a technical mistake during its re-build of the system in advance of a then pending renewal had resulted in this occurring. WOW penetration in Fraser remains the lowest across southeastern Michigan.

[6] . A metropolitan Detroit newspaper story about the beginning of competitive cable television service in Plymouth was illustrated with two photos – one of the back of an incumbent operator's linesman working up on a utility pole. His trousers hung, well, too low. The other showed an Ameritech New Media installer pulling on blue paper booties before entering a customer's home.

A. Historical Background – Competitive Entry by Telecommunications Companies Was Banned by the FCC and then by the U.S. Congress, not Municipal Franchising, until Adoption of the U.S. Telecommunications Act of 1996

It is important to note before proceeding with these Reply Comment that municipal franchising of cable television systems has *never* been an obstacle to competitive entry by telecommunications companies. In 1969, cable television operators served about 6 percent of the country. In 1970, the entry of telecommunications companies into providing cable television service was banned by the Federal Communications Commission ("FCC") because of what it said was the industry's control of poles and conduits and their ability to preempt the market through discriminatory access. [7] In Michigan, however, almost all poles and conduits were then and are today owned by the electric utility companies, not Ameritech or Verizon, the two dominant telecommunications providers.

Nonetheless, in 1984, the U.S. Congress passed the U.S. Cable Communications Policy Act. Section 613(b) of the 1984 Cable Act, codified as 47 U.S.C. § 533(b), made statutory the dubious FCC ban of 18 years before. In 1988, the FCC concluded that the telco-cable cross-ownership ban was

[7] . Application of Telephone Companies for Section 214 Certificates for Channel Facilities, 21 F.C.C.2d 307, 325, *aff'd sub nom.* General Telephone Company of the Southwest v. United States, 449 F.2d. 846 (5th Cir. 1971). The ban was codified at 47 C.F.R. § 64.601.

constitutional. [8] In 1992, in the *First Video Dialtone Order*, [9] the FCC reversed course on grounds that growth of the cable television industry since 1970 had reduced the danger that telephone companies could exclude independent cable operators from the marketplace and that, with appropriate safeguards, there would be little risk of anti-competitive conduct. Over the next *three years*, the FCC embarked on a futile effort to adopt rules allowing telecommunications companies to do so. [10]

Meanwhile, frustrated with delay at the FCC, the telecommunications companies sought judicial relief. On August 24, 1993, the U.S. District Court for the Eastern District of Virginia down the telco-cable cross-ownership ban as a violation of the First Amendment and the Fourth Circuit affirmed. [11] The Ninth Circuit and district courts in five other jurisdictions also found the ban unconstitutional, including a challenge by Ameritech, which said it wanted to build competitive systems in Michigan, Ohio, Indiana and Illinois. [12] Meanwhile, Ameritech's application for approval to begin construction of its

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[8]. Telephone Company-Cable Television Cross-Ownership Rules, 3 F.C.C.R. 5849, 5864 (1988) (Further Notice of Inquiry and Notice of Proposed Rulemaking).

[9]. Telephone Company-Cable Television Cross-Ownership Rules, 7 F.C.C.R. 5781, 5820 (1992)(Second Report and Order, Recommendation to Congress and Second Further Notice of Proposed Rulemaking).

[10]. Putting a timer on the U.S. Congress, FCC and local government decision-makers regarding competitive entry applications by telecommunications providers suggests that cities, townships and villages across the country is many, many years ahead of the FCC in bringing competition to cable television.

[11] . Chesapeake & Potomac Telephone Company of Virginia v. United States, 830 F. Supp. 909 (E.D. Virginia 1993) aff'd 42 F.3d. 181 (4th Cir. 1994).

[12]. Ameritech Corp. v. United States, 867 F. Supp 721 (N.D. Ill. 1994).

competitive video dialtone system in southeastern Michigan filed in 1994 languished before the FCC. Finally, on December 23, 1994, the FCC acted. [13] There followed a petition for re-consideration and further wrangling. The FCC initiated proceedings seeking comment on how it should alter its video dialtone regulations to facilitate the competitive entry of telephone companies. [14]

In early 1995, awaiting a ruling on the petition for reconsideration from the FCC, Ameritech changed course, undertaking efforts to begin secure cable television franchises within the areas it had earlier sought approval from the FCC to offer video dialtone service, using the engineering and marketing data it had already prepared. It started against the weakest cable operator in southeastern Michigan. Described in more detail later, its subsidiary, Ameritech New Media, quickly concluded franchise negotiations with four communities in southeastern Michigan and the cable television industry just as quickly filed objections to its application to the FCC under §214 for streamlined approval to proceed. [15] The cable television industry launched a series of other complaints against Ameritech New Media here and elsewhere, all of which were eventually rejected by the FCC, in proceedings

[13] . In the Matter of the Application of Ameritech Operating Companies, FCC 94-340 adopted December 23, 1994.

[14]. Telephone Company-Cable Television Cross-Ownership Rules, 60 Fed. Reg. 8996 (1995)(Fourth Further Notice of Proposed Rulemaking).

[15] . In the Matter of the Applications of Ameritech New Media Enterprises, Inc., DA 95-1954, adopted September 11, 1995.

which consumed more time than was taken in negotiating these four franchises with local government.

The FCC did not issue its decision re-affirming and dismissing the petition for re-consideration and until October 6, 1995 [16] amidst the complete re-writing of U.S. telecommunications law pending in the U.S. Congress, which appeared poised to strike down the ban on telco-cable television cross-ownership. After several false starts and last minute political wrangling, the U.S. Congress passed the sweeping new law on February 1, 1996 by overwhelming margins. President Clinton signed the Act into law in a ceremony at the Library of Congress on February 8, 1996. The Act repealed the telco-cable cross-ownership ban of 47 U.S. C. § 533(b) and also terminated video dialtone regulations. It substantially abolished the historic barriers to cable's delivery of telephone services. It declares that no state or local laws or regulations "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." In addition, the Act supersedes the MFJ, GTE consent decree and AT&T-McCaw consent decree. A telecommunications provider such as Ameritech providing video programming to subscribers otherwise would be treated as any other cable television operator, subject to the 1984 Cable Act, including municipal franchising, PEG and leased access, customer service and other requirements, unless Ameritech elected to provide its programming via an open video system that replaced the FCC's ill-fated video dialtone scheme.

Against this background, it need not be said here but should be emphasized as the FCC seeks comments and reply comments in this NPRM -- every single major decision by the FCC since 1970 regarding competitive entry by the telecommunications company was overturned by the courts, the U.S. Congress or both. Now, if ever, will the FCC choose a course, which propels rather then hampers competitive entry? The Southeastern Michigan Communities filing these Reply Comments are doubtful of gaining early entry by AT&T regardless of what the FCC decides. They offer these Reply Comments because their experience demonstrates that competitive entry under the existing requirement of the 1984 Cable Act not only worked very well but benefited them and their residents greatly since 1995. They know, too, that as long as this NPRM remains pending, that the renewal of expiring cable television franchises will be frozen and that competitive entry elsewhere in metropolitan Detroit will remain stalled.

If the FCC had decided in issuing this NPRM to bring further upgrading and rebuilding of existing cable television systems and the competitive entry of telecommunications providers to a standstill while the U.S. Congress took up these same issues, it could not have chosen a more effective path more likely to do so. This NPRM stands as a roadblock on the information highway and squarely puts the FCC into the role of standing against the promise of a truly a competitive marketplace in favor of instead drawing to itself a role that history dating back centuries has demonstrated should be reserved to local government – the franchising of essential providers of public commerce.

B. The Franchise Dates Back to Fourteenth Century English Common Law

Cable television began in 1948 as an alternative means of delivering television service to viewers in the mountains of Pennsylvania where reception of over-the-air TV signals was poor because of the terrain and long distance. It has since expanded into a multi-billion dollar industry serving almost eighty percent of United States television households. The builder of that first community antenna television system, as they were called, could have had no idea of what would happen over the next nearly 60 years in the technology and in the local, state, and federal law governing cable television. Certainly, the builder never could have anticipated that there would be many federal lawsuits challenging the bedrock common law requirement that cable television systems must obtain a utility franchise and operate in the public interest. In these lawsuits, cable television operators would argue over and over again (unsuccessfully) that the only legitimate role of municipal regulators is narrowly related to construction activity in the public rights of way.

Once simply considered a provider of broadcast station television programming, today, cable television's fiber optic broadband networks are proving to be ideal pipelines for the delivery of new advanced telecommunications services, including digital data networks, video-on-demand, interactive television, high-speed Internet access and telephone service. As the technology of cable television and telecommunications rapidly move towards convergence, challenges to the municipal franchise requirement have moved from the federal courts to the Congress and the state legislatures. There, arguments for deregulation, fueled by the promise of competition in the delivery of service, have succeeded in narrowing the authority that can be exercised by local government over cable television and telecommunications companies as they move into each other's business.

When cable television began, system operators located antennas in areas with good reception and picked up broadcast station signals; they then distributed the signals on coaxial cables to subscribers for a monthly fee. Under common law principles dating back to the fourteenth century, [17] cable television systems were primarily regulated by local government, which required them to obtain a franchise to install the coaxial cables on utility poles or underground along and across the public rights of way. The franchise is a unique creation of the common law under which all of the land

[17] . Proprietors of the Charles River Bridge v. Proprietors of the Warren Bridge, 36 U.S. 420, 432 (1837).

held by the Crown of England belonged to the realm for use in the best interests of the Kingdom. The Crown granted a revocable privilege to a subject in the form of a charter, which possessed all of the obligations of a contract, to use a particular piece of land to operate a business affected with the public interest, such as a ferryboat service. This privilege became known as a franchise. It could be operated only with the Crown's permission, could be regulated concerning the prices and methods of operation, and could be required to serve all customers willing to pay. For this privilege, the subject paid a concession fee to the Crown during its term. The common law came to distinguish

between businesses affected with the public interest needing a franchise and those ordinary trades whose market structure is effectively competitive, barring the Crown from granting a government- protected monopoly. [18] Businesses engaged in providing

market and transportation services for the sale and delivery of crops and goods, such as fairs, wharves, canals, ferries, bridges, and toll roads, came to be recognized as prerogatives of the Crown for which a franchise was required. These were the first

kinds of services which came to be recognized as public utilities and natural monopolies—a market in which the more a firm produces, the lower the costs of production per unit become. For example, the largest costs of operating a

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[18]. *See* Michael Conant, *Antimonopoly Tradition Under the Ninth and Fourteenth Amendments: Slaughterhouse Cases Re-Examin*ed, 31 Emory L. J. 785 (1982).

ferryboat are those related to building and maintaining the boat. A single boat, if large enough, can satisfy the entire market demand under most circumstances. The marginal cost of adding an additional customer is very small. As a result, the cost of building and operating

a single ferryboat is far lower than the cost of building multiple boats and letting them compete against each other. However, a monopoly will charge a monopoly price.

That fact produced a need for government regulation by way of requiring a franchise which preserved authority to control rates and to require that service be provided fairly and in the public interest. [19] In 1888, the U.S. Supreme Court summarized a franchise

as "[A] right, privilege or power of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration, either by the government directly, or by public agents, acting under such conditions and regulations as the government may impose in the public interest, and for the public security." [20] The burgeoning United States national economy of the late 1800s, brought about by the new technologies of street railways, telegraphs,

[19] . Cable industry leaders insist that their business never functioned as natural monopolies because they have always faced competition from other entertainment media. One of the more forceful voices in making these arguments is Professor Dr. Thomas Hazlett of the George Mason University, former FCC chief economist. He joined Comments filed by Verizon in this proceeding. (*See* Attachment B to the Comments of Verizon dated February 13, 2006.)

[20] . *California v. Central Pac. Ry. Co.*, 127 U.S. 1, 40 (1888). Many states have adopted this definition. *See, e.g., Traverse City v. Consumers Power Co.*, 64 N.W.2d 894 (Mich. 1954).

natural gas, electricity, and telephone service, brought new concepts to the regulation of public utilities and the granting of franchises. The great civic, commercial, and industrial importance of these new services persuaded states across the country to adopt constitutions and statutes allowing municipal ownership of public utilities -- against great resistance from business interests. The National Civic Federation, an organization of business and labor leaders and independent reformers, established a Commission on Public Ownership of Public Utilities. The Commission issued a widely circulated and influential report in 1905 recommending, among other things, that municipalities should
have the right to own public utilities subject to a popular vote, that franchises should be terminable after a fixed period, and that public utilities should be subject to municipal purchase at their fair value. [21] States adopted constitutional and legislative measures protective of public utility investors to prevent wasteful duplication of physical facilities, limit service territories, and avoid otherwise ruinous competition. They adopted other measures protective of consumers, preserving service to marginal customers, maintaining service and, of course, controlling monopoly profits by creating statewide public utility commissions with a broad range of regulatory authority. The sovereign power to

[21] . Jones*, Origins of the Certificate of Public Convenience and Necessity: Developments in the States 1870-1920*, 79 Colum. L. Rev. 426, 451 (1979).

grant franchises to install local facilities was taken away from state government and conferred on local government by statute or constitutional provision, preserving state authority over entry into the business through the use of certificates of need. The

power to grant franchises was delegated to local government officials because of their primary responsibility for building and maintaining the streets and alleys used to install railway tracks, telegraph, electric, and telephone poles, conduits, wires, and natural gas pipes. For example, Michigan's Constitution was amended in 1908 to bar public utilities from using public rights of way for the installation of any facilities without obtaining municipal consent and to forbid them from transacting local business without acquiring a municipal franchise. Many state courts have directly held that cable television systems are public utilities within the meaning of particular city charters, state statutes, and constitutional provisions. [22]

C. Federal Limits on Municipal Franchising Have Steadily Tightened Since 1965

The broad local government role in franchising cable television systems as public utilities has slowly eroded since 1965 when the FCC established rules for cable systems receiving signals by microwave antennas. In March 1966,

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[22] . See cases from around the country collected at Neil J. Lehto, *Public Utility Franchise Requirements: Regulating Cable Television the Old-Fashioned Way*, 8 Cooley L. Rev. 33, 35 n. 10 (1991).

the FCC established rules for all cable systems, whether or not they used microwave. These regulations required cable systems to carry all local television stations, prohibited systems from carrying programming on the same day from another city which duplicated a program broadcast by a local station, and barred cable systems from importing distant station programming into the 100 major television markets in the country without a hearing by the FCC on the local impact of doing so. These regulations were upheld by the U.S. Supreme Court in *United States v. Southwestern Cable Company.* [23] The Court ruled:

> [T]he Commission has reasonably concluded that regulatory authority over CATV is imperative if it is to perform with appropriate effectiveness certain of its responsibilities.

The Court found that the FCC needed authority over cable systems to assure the preservation of local broadcast service and to effect an equitable distribution of broadcast services among the various regions of the country. A few years later, in *TV Pix,*

Inc., v. Taylor, [24] the role of local government in regulating cable television as a public utility subject to the franchise requirement was upheld by a three-judge court in a challenge to a Nevada statute specifically providing for such regulation. In affirming

[23]. 392 U.S. 157 (1968).

[24] . 304 F. Supp. 459 (D. Nev. 1968) *aff'd per curiam* 396 U.S. 566 (1970).

the local role, however, the court observed that certain aspects of cable television service—those affecting interstate commerce—were within the authority of federal law:

> Unquestionably, there is an area of where the Commerce Clause of the Constitution is in a sense self-executing; that is to say, state legislation of a certain kind in certain circumstances is adjured by the Constitution itself, regardless of whether Congress has acted.

On the other hand, the court disagreed that requiring a local public utility franchise was an activity affecting interstate commerce:

> We do not view the subjects of regulation contemplated by the Nevada statute, *i.e.,* the quality of and rates charged for community antenna service, as being of the character demanding national uniformity so that state action is entirely inadmissible. On the contrary, these are subjects which lend themselves naturally to local control and supervision. National uniformity is probably not a possibility, let alone an acceptable ideal. [25]

On February 2, 1972, the FCC adopted new standards covering the award of franchises, operator qualifications, their duration, system construction schedules, public access channel requirements, and consumer complaints. Franchise fees were capped at five percent of gross revenues per year from all cable services in the community. FCC approval was required for franchise fees of more than three percent upon a showing that they would not interfere with federal regulatory goals for cable television and were appropriate in

[25] . *Id* at 463.

light of the planned local regulatory program. Provisions of the 1972 regulations requiring cable systems having more than 3,500 subscribers to make facilities

available for the local production of programming were upheld in *United States v. Midwest Video Corporation*. [26] Although the Court did not address the First Amendment in deciding the case, it did recognize a legitimate governmental interest in providing local

outlets for individual expression. The broad reach of the Commission's rules under the limited authority of the Communications Act of 1934, however, came under criticism in the concurring opinion by Chief Justice Warren Burger who suggested "that the Commission's position strains the outer limits of even the open-ended and pervasive jurisdiction that has evolved by decisions of the Commission and the courts." [27]

Perhaps, in reaction to the warnings of Chief Justice Burger, the FCC modified or eliminated these rules in succeeding years. The FCC deleted most of its franchise standards in 1977. Franchise fee rules remained, but the others were noted as voluntary

procedures and guidelines until after adoption of the U. S. Cable Communications Policy Act of 1984, when they were repealed. The FCC had already repealed the local origination requirement in 1974 and revised other

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[26] . 406 U.S. 649 (1977).

[27]. *Id.* At 676.

rules requiring, but limiting, public, educational, and government (PEG) access channels, studio, and production equipment in 1976. [28] Again, these rules came under attack by the cable industry as outside the FCC's jurisdiction, and they were struck down in 1979 by the U.S. Supreme Court in *FCC v. Midwest Video Corporation*. [29] Nullifying FCC preemption of the area, the ruling was interpreted by some as protecting the authority of local government officials to award and renew franchises requiring franchise fees, PEG channels, studio, and production equipment.

In several rulings during the 1970s, the FCC recognized local authority to regulate basic cable rate services but prohibited the regulation of pay cable services, such as HBO, which revolutionized the cable industry in 1975 by delivering its programming by satellite. Satellite delivery made it possible for cable systems across the country to economically provide a vast array of national programming services to local subscribers—movies, sports, news, and specialized programs directed at important segments of the national television audience such as children, minorities, and senior citizens. As a direct consequence, the cable television industry boomed over the next few years. The years from 1975 to 1984 were characterized in many cities by franchise bidding wars among competing cable television companies. The FCC's rate regulations originally defined basic cable service as "regular

[28]. Report and Order in Docket No. 20508, 59 F.C.C. 2d 725 (1970).

[29]. 440 U.S. 689 (1979).

subscriber service," which it described as "that service regularly provided to all subscribers." The FCC said "regular subscriber service" included "all broadcast signal carriage and all required access channels including origination programming." The FCC expressly preempted local regulation of rates for "specialized programming for which a per-program or per channel charge is made." The FCC's preemption from local regulation of pay cable programming was challenged but affirmed in *Brookhaven Cable TV, Inc. v. Kelly.* [30]

Over time, as the number of satellite-delivered programming services grew, municipal officials and cable operators assumed that the FCC preemption of local regulation for pay cable services applied only to programming made available for

a separate fee on a per program or per channel basis. However, the distinction between basic and pay services became increasingly unclear as a result of the industry practice of providing service to subscribers in packages, known as tiers. The FCC rules were construed by municipal officials and some cable operators as permitting local regulation of rates for any satellite-delivered program included in a tier or multiple tier of service designated as basic service in a franchise. In November 1983, the FCC decided

[30] . 573 F.2d 765 (2nd Cir. 1978) *cert. denied* 441 U.S. 904 (1979).

otherwise, saying that only the rate charged for any tier of service offering local broadcast stations and PEG channels was subject to regulation. [31] That was followed in June 1984 by a U.S. Supreme Court ruling in *Capital Cities Cable, Inc., v. Crisp,* [32] which contained a lengthy and appreciative descriptive history of the FCC's preemption of local regulation. That ruling suggested to many that the Court was ready to endorse FCC policies that broadly deregulated the cable television industry. The FCC had been working on a cable preemption package when *Crisp* was decided and appeared ready to take action. It was against this backdrop that the U.S. Congress stepped in against the FCC with the adoption of the United States Cable Communications Policy Act of 1984.

The 1984 Act added Title VI to the Communications Act of 1934, the first major change in the Communications Act. Congress' principle purpose in enacting the 1984 Act was to establish "a national policy that clarifies the current system of local, state and federal regulation of cable television. This policy continued reliance on the local franchising process as the primary means of cable television regulation, while defining and limiting the

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[31] . *Community Cable TV, Inc.*, CSR-2269, FCC 83-525 Memorandum Opinion & Order (released November 15, 1983); 54 Rad. Reg. 2d (P & F) 1351 (1983). The FCC reaffirmed this decision on July 25, 1984. CSR-2269, FCC 84-331 Memorandum Opinion & Order (released July 25, 1984); Rad. Reg. 2d (P&F) 735 (1984).

[32] . 467 US 691 (1984).

authority that a franchising authority may exercise through the franchise process." [33]

The 1984 Cable Act legislatively adopted the local franchise requirement and capped franchise fees at five percent of gross revenues. The Act also authorized municipal officials to adopt and enforce consumer protection measures for cable subscribers

under the local police power, and to negotiate franchise terms requiring PEG channels, studios, and production equipment, as well as institutional network service. In return, the

cable industry received franchise renewal protection and relief from rate and programming regulation. In addition, the Act established federal policies in the areas of ownership, channel usage, subscriber privacy, obscenity, channel lockboxes, unauthorized reception of services, equal employment opportunity, and pole attachments. The new law carefully defined jurisdictional boundaries among federal, state, and local authorities for regulating cable television systems. The House Committee Report emphasized that the 1984 Act was intended to "preserve the critical role of municipal government in the franchise process, while providing appropriate deregulation in certain respects to the provision of cable service." [34] The Committee Report said that

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[33]. House Comm. On Energy and Con., Report on Cable Franchising, Policy and Communications Act of 1984, H.R. REP. NO. 934, 98th Cong. 2d Sess. 19 *reprinted* in 1984 U.S. Code Cong. & Admin. News 4655.

[34]. *Id.*

the franchise process should take place at the local level "where city officials have the best understanding of local communications needs and can require cable operators to tailor the cable system to meet those needs." [35]

Responding to these concerns that the cable industry now possessed undue market power which is used to the detriment of consumers, programmers, and competing video distributors, Congress enacted the Cable Television Consumer Protection and Competition Act of 1992. The 1992 Cable Act mandated a number of changes in the manner in which cable television is regulated and put § 621(a)(1) into federal law. In adopting the 1992 Cable Act, Congress stated that its purpose was to promote the

availability of diverse views and information, to rely on the marketplace to the maximum extent possible to achieve that availability, to ensure that cable operators would continue to expand their capacity and program offerings, to ensure that cable operators do not have undue market power, and to ensure consumer interests are protected in the receipt of cable service. None of the changes made by the Act significantly affected the requirement that cable television systems must obtain a local franchise.

The 1992 Act did include provisions making major changes to the relationship between broadcasters and cable operators, including must-carry rules requiring cable operators to offer local broadcaster carriage or to obtain retransmission consent

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[35] . *Id.* at 24.

from local broadcasters. Earlier must-carry rules adopted by the Congress had been successfully challenged following adoption of the 1984 Act. A second effort made by the FCC in 1987 was also struck down. Therefore, Congress included in the 1992 Act a provision inviting a constitutional challenge with a direct appeal to the U.S. Supreme Court. The industry took up the invitation, launching a broad attack on numerous provisions of the 1992 and 1984 Acts.

In December 1995, a three-judge panel of the U. S. District Court for the District of Columbia rejected challenges to the must-carry rules. That decision was appealed. The U.S. Supreme Court, applying the O'Brien test of intermediate First Amendment scrutiny, addressed two main questions: first, whether the must-carry rules further an important governmental interest; and, second, whether they do not burden substantially more speech than is necessary to satisfy those interests. The Supreme Court answered both questions affirmatively. [36] In August 1996, the D.C. Circuit Court of Appeals upheld against constitutional attack under the First Amendment all of the non must-carry industry challenges to rate regulation, leased and PEG access under the intermediate scrutiny standard of *Turner*, indicating that it would be applied to other First

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[36] . *Turner Broadcasting System, Inc., v. FCC*, 512 US 622 (1997).

Amendment challenges to cable television regulations. [37]

In adopting the Telecommunications Act of 1996, Congress noted that its purpose was to provide a pro-competitive, deregulatory national policy framework. This framework was designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition. One provisions of the 1996 Act had implications for the municipal franchise requirement to use public rights of way as the technologies of providing cable television and telephone service converge.

This provision authorized local exchange carriers to build what the Act called open video systems using the public rights of way to offer cable television on a common carrier basis. In issuing rules, the FCC said local franchising of open video systems was preempted. These and related rules were challenged in the case of *City of Dallas v. FCC*. While the 1996 Act made it clear that the federal franchise requirement of the 1984 Cable Act could not be applied to open video systems, the City of Dallas argued that, because the local franchise requirement is derived from common law, not federal law, open video systems would still need permission to use public rights of way and could be required to obtain a local franchise. The Fifth Circuit agreed.

[37]. *Time Warner Entertainment Co., v. FCC*, 93 F.2d 957 (D.C. Cir. 1996)(*per curiam*), *reh'g en banc denied* 105 F.3d 723 (D.C. Cir. 1997).

D. What Happened in Southeastern Michigan Since 1996?

Some of the arguments now being made by AT&T against municipal franchising are particularly ironic under the circumstances demonstrated by the reception given to Ameritech New Media by 43 southeastern Michigan communities, the sore disappoint suffered by other communities which also join in filing these Reply Comments such as the Township of Waterford [38] and the Grosse Pointe area communities of Grosse Pointe Park, Grosse Woods, Grosse Pointe Shores, Grosse Pointe Farms, Grosse Pointe and Harper Woods, where Ameritech New Media pulled out before reaching a deal on terms of municipal franchises and the fact that, when Ameritech New Media was seeking franchises in southeastern Michigan, it generally agreed to a very aggressive construction schedule and build-out or density requirements on a *community-by-community basis*.

The picture that emerges from the communities where it readily obtained franchises and the communities where it did not shows very clearly that the Ameritech New Media system, as described in Comments filed by the Michigan Municipal League, circumnavigated all of the low income and minority-populated communities of southeastern Michigan. (*See* Exhibit C attached to the Comments filed by the Michigan Municipal League, *et al.*)

[38]. Waterford Township and other communities lacking competition learned that, at least in the beginning, Comcast configured its customer service telephone center answering system to accept calls originating from competitive communities well ahead of them.

There are many reasons why other communities were also by-passed here. In its Comments, AT&T briefly mentions its view of what happened:

> The Ameritech experience confirms that anticompetitive LFA decisions can bar entry even for well-financed telephone companies, which, because of their existing networks and experience, are the best-positioned entrants. In the late 1990s, Ameritech New Media ("ANM"), an affiliate of AT&T's predecessor, Ameritech, sought to provide video services in competition with the incumbent cable operators. As Ameritech began to navigate the maze of local franchising authorities, however, it encountered numerous anticompetitive conditions. For example, many local franchise authorities, even in relatively small communities, refused to deal with ANM unless it responded to voluminous Requests for Proposals, including detailed submissions of proprietary financial information. A number of communities demanded free service to public buildings, or charges for institutional networks that were patently unreasonable. One city required a multi-stage application process with public hearings, an additional 2% of gross sales tax on top of the five percent franchise fee, a $500,000 payment for local producers, a set-aside of *ten percent* of the channel capacity for a local public access corporation and a substantial payment to support the corporation. Another city insisted that ANM use, and pay rent for, conduit space owned by the city even though the required routes were inconsistent with ANM's preferred architecture. One city had the audacity to demand that Ameritech pay for a new recreation center and pool. In several cities, obtaining franchises required two or more years of negotiations. And two LFAs simply demanded that ANM give them whatever other communities could extract. Eventually, those two LFAs simply stopped negotiating when the incumbent cable operator threatened to deny local residents access to its regional access studio if the local franchise authorities granted competing franchises for ANM.
>
> In all, ANM faced difficult and inordinately time consuming negotiations in the vast majority of towns where it applied for franchises. In many jurisdictions, ANM simply abandoned the application process in the face of patently unreasonable demands. And after years of costly efforts, ANM was eventually forced to abandon entirely its initiative to provide competing video services.

The Southeastern Michigan Communities filing these Reply Comments do not recognize any of these complaints. They asked for none of these things and what they experienced was starkly different from what AT&T says occurred.

First and foremost, only one Ameritech New Media executive, Donna Garofano, personally worked on negotiating all of these franchises along with a three-man team of attorneys, who divided up the work among themselves. (They reported to an Ameritech senior counsel in Chicago, who never appeared locally in our experience.) At the beginning, typically, just Ms. Garofano and one of these attorneys attended all bargaining meetings with municipal officials. Later, Ms. Garofano sent just one of these attorneys as the pace of obtaining franchises widened and quickened.

They conducted their first negotiation jointly with Plymouth, Northville, Plymouth and Canton Townships, where the incumbent cable operator was engaged in a hotly contested formal franchise renewal proceeding. The cable television system there was technically outmoded, poorly maintained, customer service was abysmal and these four communities appeared to be poised to deny renewal. [39] During this negotiation, which consumed just a few months, Ms. Garofano and these attorneys refined their approach. First, the franchise that emerged here

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[39] . A minority owner of the system was Continental Cablevision, which bought out the majority owner and rapidly began upgrading the system following award of competitive franchises to Ameritech New Media.

became their model document. Second, they never filed any kind of application documents or paid any application fees, regardless of what the local cable television ordinance required. Ameritech New Media's small franchise negotiating team insisted on and achieved a very high degree of uniformity in adhering to the terms of their model franchises not only with regard to the nitty-gritty of insurance, bonding, right-of-way and other boilerplate clauses but they vigorously insisted on capping reimbursable expenses incident to the awarding of these franchises, [40] limited to three the number of public, educational and governmental ("PEG") access channels, [41]

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[40] . In the first agreement, they came to the table with an offer of $50,000 per community, which, of course, they ended up paying. They knocked that down to a flat $10,000 in the next few negotiations and then simply offered to reimburse actual out-of-pocket expenses, with a few exceptions where a payment so designated in the franchise actually was sweetener of the final deal.

[41] . Ameritech New Media reached a tentative franchise with Livonia, where it would have set aside four PEG channels. However, that deal fell apart. On November 1, 1999, *The Detroit News* reported

> "Bitter criticism and hard feelings have cost the city millions of dollars in revenue with the insistence by New Media Ameritech officials that they no longer are interested in bringing a second cable company into Livonia.
>
> Despite some last-minute pleas and kow-towing by the City Council, the communications giant won't change its mind, said Donna Garofano, vice-president of public affairs for Ameritech New Media.
>
> The city stands to lose an $11.7-million cable system, 5 percent of the franchise fees, free cable to 67 school and city buildings and $15,000 for the reimbursement of franchise costs.
>
> They also lose the opportunity for cable competition. Time Warner Cable has been operating as the only cable provider in the city for the last 16 years. Representatives for Ameritech New Media walked out of a confrontational meeting last week with council members, and sent notice to Mayor Jack Kirksey they were withdrawing their request to provide cable television service in Livonia, Wayne County's second largest city.
>
> The Ameritech people were upset because they thought they had an agreement with the city to provide four public access channels, but suddenly

proposed constructing their system so as to geographically match up with public school district boundaries (thereby delivering subscribers only the programming of their respective school district), offered a maximum up-front PEG cash grant according to a murky formula and on-going PEG support of up to 1 percent of gross revenues. They by-passed communities which found these limitations unacceptable. This occurred almost uniformly in

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some on the council wanted five. The debate became heated, and Ameritech walked out of the meeting.

Stunned by the breakdown in the negotiations, the council two days later voted unanimously to approve the initial 15-year franchise agreement after Ameritech had already withdrawn.

Council President Jack Engebretson, Kirksey and Councilman John Walsh sent apologetic letters to Garofano. Members even sent a videotape of the vote by overnight mail in an attempt to sway Ameritech's return. A second reading was scheduled on Nov. 10 to finalize the agreement.

The quick action was to no avail.

"I'm afraid their efforts are in vain," Garofano said. "In our view, there was a lot of issues raised in the eleventh hour in an attempt to dissuade us, and guess what -- they succeeded."

The hard line surprised some on the council.

"I'm literally dumbfounded," said Councilman Joe Laura, who had a heated discussion with Garofano at the council meeting. "The questions we were asking were not hard questions. I've been in more difficult council meetings."

But those questions should have been brought up months earlier during the public hearings or briefings the company offered, Garofano said.

She said the later council support was just a political move by the majority of council members to avoid resident backlash in Tuesday's election.

"Up to this point we only had three supporters on council," Garofano said. "It's difficult to be comfortable in an environment where Councilman Laura said we're posturing. We're not posturing and we're not calling anybody's bluff."

Ameritech has entered into agreements with 114 other communities. It is the first time they've halted negotiations this far into the process, Garofano said.

communities with robust PEG programming financed in large measure by the incumbent cable operator.

The small Ameritech negotiating moved deliberately, barely keeping pace in gaining new franchises ahead of what their construction crews could build from community to community. Following the merger of SBC and Ameritech, announced in the spring of 1998, the pace of franchise negotiations quickened, partly in municipal response to growing speculation that SBC would withdraw from the overbuild market as it had elsewhere when acquiring telecommunications companies. In the fall of 1999, Ameritech New Media stopped seeking new franchises altogether.

The conclusion Southeastern Michigan Communities draw from their experience is that what Ameritech New Media did here and did not do here was not so much dictated by delays in franchise negotiations with municipal officials as it was by Ameritech New Media's small team of negotiators, its inability to move construction crews and marketing teams in a timely manner from one community to the next in response to a newly-awarded franchise in a highly-competitive market and SBC's merger with Ameritech. This probably explains why Verizon, AT&T and the RBOCs want to abolish municipal franchising – they want unfettered discretion to decide themselves, without consulting local, state or even federal regulators, where they make the business investment needed to first offer service, where they delay making the business investment needed to last offer service and where they never make any business investment to offer service because of their inability, unwillingness or both to build-out and offer cable television service in timely response to even readily negotiated franchises with local government officials. The only obstacle to cable television competition today is not the slight delay occasioned by municipal officials or by municipal franchising but that doing so on a community-by-community basis exposes what the telecommunications industry is doing to much-needed public scrutiny and accountability as well as alerting its cable television industry competitors to where they are going next. [42]

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[42] . *See* Professor Hazlett's admission to this fact in Attachment B to Verizon's Comments. He said: "One of the most economically important of the specific regulations imposed by franchises is referred to as "build-out requirements." A build-out requirement commits an operator to a particular system construction schedule; sometimes it includes a designated plan, mandating which neighborhoods are to be served first, which next, and so on. The requirement might stipulate other structural or technological features, or demand that a new entrant 'entirely rebuild' an already constructed network. This form of regulation is anti-competitive, both *because it announces to the incumbent where it will first face competition and the type of system with which it will compete,* and because it substantially raises the costs of the entrant. By reducing the entrant's flexibility in making economic choices about its technological options, how to offer service to customers, how to most efficiently build its facilities, how to manage overlapping system architectures, and so forth, system regulations (including build-out requirements) lower
the probability that entry will occur at all." (Emphasis added.)

Professor Hazlett seems unaware that LFAs cannot dictate structural or technological features or demand that an already constructed network be re-built. The FCC has stated that there are some limitations on local authority: according to the FCC, a community may not dictate "whether a cable operator uses digital or analog transmissions [or to] determine whether its transmission plant is composed of coaxial cable, fiber optic cable or microwave radio facilities ...." However, the FCC went on to state that "[w]hile the 1996 Act imposes some specific limits of the role [LFAs] play with respect to subscriber equipment and transmission technology, it does not diminish the [LFAs] important responsibilities in determining local cable-related needs and interests and seeing that those needs are met through the franchising and renewal process. Although local authorities are limited in dictating the use of transmission technologies, other facility and equipment requirements can still be enforced…."

Most of the wealthier suburban Detroit neighborhoods, the Grosse Pointes and Harper Woods, Birmingham, Bloomfield Hills, Bloomfield Township and West Bloomfield Township, as well as the upper middle class neighborhoods of Farmington, Farmington Hills, Novi and Livonia, and the middle class neighborhoods of Waterford Township, [43] all failed to gain a competitive provider and today pay much higher rates to Comcast than those where the current owner of the competitive system, WOW, operates. In some of these cases and others, the communities were negotiating renewal franchises with Time-Warner (now BrightHouse), MediaOne, (later AT&T Broadband), and they gained significant PEG concessions in exchange for giving the incumbent cable operator draconian level playing field protection against Ameritech New Media. [44]

However, Exhibit C mentioned above also shows that Ameritech New Media skipped over Pontiac, Ecorse, River Rouge, Inkster, Highland Park, Hamtramck and Detroit, all low income, minority-populated or both. The by-passing of Inkster is particularly egregious because it's surrounded by communities where Ameritech New Media obtained franchises, and one or

[43] . Ameritech New Media's attorneys explained that system architecture – the single headend was located in Troy -- demanded that they first obtain franchises in Auburn Hills and Pontiac before moving into neighboring Waterford Township. Franchises negotiations in these two communities faltered in the months before the company ceased all franchising efforts in late 1999.

[44] . For example, in Southfield, MediaOne agreed, among other things, to pay a 5 percent franchise fee, make PEG grants of $790,000, build an institutional network costing no less than $285,000 and pay an additional 3 percent support for PEG. If the City later agreed to lesser favorable franchise terms with a competitive provider, Southfield would be required by the language of its level playing field agreement to pay back any excess amount to MediaOne, all of which already would have been sunk into facility, equipment and operating costs. Comcast has since acquired the cable television serving the City.

more school districts overlap the boundary, *i.e.,* the Westwood Community School District. Therefore, it's clear from the experience of southeastern Michigan that community-by-community build-out requirements simply don't work, especially when considering how to regulate the entry statewide telecommunications providers such as AT&T and Verizon into cable television. One obvious suggestion is that, if the FCC or the U.S. Congress wants to take on the issue of redlining by income and minority populations that they should require the uniform build-out of entire SMSAs, DMAs or, perhaps, Congressional Districts.

All of the Ameritech New Media franchises in southeastern Michigan were acquired by SBC in 1998 when it purchased Ameritech. SBC ceased gathering new franchises in late 1999 and sold them along with others suburban Cleveland, Columbus and Chicago to WideOpenWest ("WOW") in 2001. Since then the number of customers served by WOW has grown from 293, 000 to 344,000. J.D. Power & Associates has recognized WOW as the best provider of customer service among all cable television and satellite TV companies for two years in a row. WOW quickly added digital television services to the analog channels offered by Ameritech New Media and launched multiple tiers of high-speed Internet access service and recently began offering VoIP telephone service.

Having hundreds of cable television channels from which to choose is nice, but it pales in comparison to having a choice of two competitive providers for that programming. In southeastern Michigan, nearly a third of all households benefit from both. Competition between WOW and Comcast keeps our cable television rates lower than most in the state and much lower than the national average. The Detroit News reported on June 21, 2005 that a subscriber in Berkley, who threatened to bolt to another cable company, was given a $504 discount through January 2007. Similarly, a Harrison Township resident said he was offered a savings of $192 a year after he asked for reduced rates from his cable company.

Cable consumers who have the choice between two cable television companies pay about 10 percent less per channel than other households, according to reports by the FCC. Nationally, only about 8 percent of homes have access to multiple cable television system providers. More should and southeastern Michigan stands as a prime example of why that should be the case -- competition puts consumers in control and forces video, broadband and telecommunications companies to provide better services for lower costs. It also forces cable, Internet and telephone providers to think differently about what services they offer and how much those items will cost. Lowering rates for one service often entices customers to buy other services. Customers get consolidated bills and companies diversify their product base and reduce the number of people who defect. That's a strong case for competition and one that should be expanded but not at the cost of entirely preempting local control of all municipal cable television franchises and all users of the public rights-of-way.

The Southeastern Michigan Municipalities where Ameritech New Media readily obtained municipal franchises were no field of dreams, which promised, "If you build it, they will come." Rather, they acted in fulfillment of a state constitutional requirement that companies seeking to use the public rights-of-way to transact business as a public utility must obtain a municipal franchise, a requirement recognized by the U.S. Cable Communications Policy Act of 1984. Comments filed earlier by NATOA and by the Michigan Municipal League emphasize that all users of public rights-of-way in Michigan gain entry from local government not under federal law but rather, under the state constitution in the form of a franchise, which may be granted or denied with absolute legislative discretion, subject, however to the Cable Act's protection against unreasonable denial for those seeking a competitive franchise.

II. THERE IS A DEARTH OF SPECIFIC COMPLAINTS AGAINST SPECIFIC COMMUNITIES IN THE COMMENTS FROM THE TELECOMMUNICATIONS INDUSTRY

The communities filing these Reply Comments have slogged their way through the 4,026 Comments and Reply Comments filed in the FCC video franchise proceedings as of February 28, 2006 -- the vast majority coming from persons using on-line templates such as that available at http://www.freepress.net/fcc/comment.php?d=05-311. Many communities filed comments using the template provided by NATOA at its website of www.natoa.org. These comments report the tremendously wide diversity of local regulatory response to municipal cable television franchising, especially in the area of public, educational and governmental access channels, equipment and facility requirements, which, today, uniformly were the consequence of arms-length bargaining between incumbent cable television operators and municipal officials – the number of fully contested formal renewal proceedings conducted since 1984 probably can be counted on less than 10 fingers.

In the comments filed by most of the big telecommunications players -- AT&T, Verizon, BellSouth, Qwest, various telecommunications lobbying groups, Comcast, Cablevision, Charter and the NCTA -- curiously, there is a dearth of specific complaints against the specific municipal franchising policies of specific communities. The FCC's Notice of Proposed Rulemaking asked:

> "We request comment on the current environment in which would-be new entrants attempt to obtain competitive cable franchises. How many franchising authorities are there nationally? How many franchises are needed to reach 60 or 80 percent of cable subscribers? In how many of these franchise areas do new entrants provide or intend to provide competitive video services? Are cable systems generally equivalent to franchise areas? . . . How many competitive franchises have been awarded to date? How many competitive franchises have potential new entrants requested to date? How much time, on

average, has elapsed between the date of application and the date of grant, and during that time period, how much time, on average, was spent in active negotiations? How many applications have been denied?

"How many negotiations currently are ongoing? Are the terms being proffered consistent with the requirements of Title VI? How has the cable marketplace changed since the passage of the 1992 Cable Act, and what effect have those changes had on the process of obtaining a competitive cable franchise? Are current procedures or requirements appropriate for any cable operator, including existing cable operators? What problems have cable incumbents encountered with LFAs? Should cable service requirements vary greatly from jurisdiction to jurisdiction? Are certain cable service requirements no longer needed in light of competition in the MVPD marketplace? *To what extent are LFAs demanding concessions that are not relevant to providing cable services? Commenters arguing that such abuses are occurring are asked to provide specific examples of such demands. Parties should submit empirical data on the extent to which LFAs unreasonably refuse to award competitive franchises. We seek record evidence of both concrete examples and broader information that demonstrate the extent to which any problems exist."* (Emphasis Added.)

Overall, the industry failed to answer any of these questions, leaving aside for the moment the handful of non-specific complaints made by Verizon. The Comments reviewed by Southeastern Michigan Municipalities offered not any credible evidence upon which the FCC or anybody else, including the U.S. Congress, could conclude that any local franchising authority has unreasonably refused to award an additional competitive franchise or sought to gain concessions unrelated to video service. [45] Instead, as argued by AT&T:

[45] . Verizon's Comments complained about one community in Massachusetts, which it refused to name, that it said "*initially demanded*, among other things that [the company] provide

"The urgent need for national rules to give content to the § 621(a)(1)4 reasonableness requirement *does not rest on evidence that many local franchising authorities ("LFAs") have in the past imposed anticompetitive barriers to entry and failed to allow competitive entry as quickly and effectively as possible or on predictions that LFAs will intentionally abuse the franchising process in the future.* (Emphasis added.)

"Rather, it is the revolutionary changes in technology, the scale and scope of planned entry and video marketplace dynamics that guarantee that continuing to leave the conditions on (and timing of) competitive video entry entirely in the hands of local authorities would produce intolerable entry barriers – even if each of the nation's thousands of LFAs could be expected to act as quickly and reasonably as state and local laws allow. *The focus here must therefore be on the enormous threat that unconstrained local franchising poses to large-scale entry in the current environment and on the steps the Commission must take to avert that harm."* (Emphasis added.)

This is a remarkably candid admission that there is no factual basis whatsoever upon which the FCC could exercise whatever legal authority it may have to construe or enforce § 621(a)(1), certainly not by preempting or constraining municipal franchising of incumbent telecommunications companies seeking entry into the competitive video services market. AT&T's public policy argument is appropriately addressed not to the FCC but to the

funds for the town to purchase streetlights from a third party owner, install cell phone repeaters at Town Hall, wire all house of worship, and make parking available at a Verizon facility for patrons of the public library." Verizon CEO Ivan Seidenberg mentioned some of this again at a public hearing on video franchising before the U.S. Senate Committee on Commerce, Science and Transportation on February 15, 2006. (Emphasis added.) *See* http://today.reuters.com/news/newsArticle.aspx?type=technologyNews&storyID=2006-02-15T212839Z_01_N1511767_RTRUKOC_0_US-TELECOMS-CONGRESS-VIDEO.xml. The Declaration of Marilyn O'Connell, Verizon Senior Vice President of Video Solutions, makes other non-specific complaints, apparently to skirt the FCC rule that Comments making complaints against municipalities be served upon them so that they may have an opportunity to respond. Overall, this NPRM and the industry response looks like a distraction and roadblock designed to bring to a halt the negotiation of any expired and pending cable franchise renewals.

U.S. Congress, which is taking up consideration of legislation which may preempt or constrain municipal franchising of video service providers using the public rights-of-way notwithstanding the complete absence of evidence that municipalities stand in any way against competitive entry by the telecommunications companies. To the contrary, in hundreds, if not thousands of filings, municipalities not only generously invite Verizon, AT&T, BellSouth, Qwest and all others competitors to come to them but to do so FIRST there before building elsewhere.

III. COMMUNITY-BY-COMMUNITY BUILD-OUT AND DENSITY REQUIREMENTS REQUIRES LOCAL POLITICAL ACCOUNTABILITY. STRIPPING THAT AWAY LEAVES INDUSTRY TO MAKE PUBLIC POLICY.

All of the telecommunications industry filings argue most vigorously against mandatory build-out requirements. This was the single, biggest headache faced by the cable television industry when it sought municipal franchises nationally beginning in the late 1970s and early 1980s and it is today for telecommunications industry. The public policy issues raised by the industry's demand for doing away with community-by-community build-out and density requirements will be an even bigger problem for the FCC and U.S. Congress.

Under the current federal, state and local law, locally responsible, publicly elected municipal officials typically are charged with negotiating overbuild cable television system construction schedules and density requirements – two highly-sensitive, tightly intertwined but separate issues that decide who will get competitive video service first and who might never get it. § 621(a)(3) allows communities to prohibit economic redlining and § 621(a)(4)(A) allows them to give a competitor a reasonable time to build-out *to all households in the franchise area.* [46]

These provisions of federal law can be seen as serving distinctly different purposes. First, § 621(a)(3) gives community's a legal basis for refusing to grant a franchise to a competitive provider, which, in the exercise of legislative discretion, the community determines would deny access to cable service because of the income of the residents of the local area in which such group resides. Second, § 621(a)(4)(A), among other things, gives community's a legal basis upon which to negotiate a schedule allowing a competitive provider a much longer time to complete construction than was offered to an incumbent cable operator. § 621(a)(4)(A) also provides a basis upon which a community may refuse to grant a franchise to a competitive

[46] . Verizon makes a lengthy argument over the intent of this language, which ignores the simple fact that all new cable television franchises are negotiated at arms-length on a community-by-community basis – neither the new entrant nor the municipality dictate the boundaries of franchise areas. They must reach *agreement* on where competitive service will be made available. §621(a)(1) requires only that communities may not *unreasonably* refuse to grant a competitive franchise. Where the franchise area chosen by a competitive provider is the sole stumbling block, § 621(a)(1) makes denial on that ground subject to review by the state or federal courts. Verizon's legal arguments may, in the appropriate case, be made not to the FCC but rather must be submitted for judicial review. Their choice of network architecture cannot, in and of itself, dictate the boundaries of franchise areas.

provider that unreasonably refuses to eventually offer service to all households in a franchise area. [47]

Preserving build-out requirements get highly complicated in any drafting of national video service franchise models, guidelines or policy. The good public policy allowing local government officials to prohibit economic red-lining and the requiring them to allow competitive providers a reasonable time to build out the entire franchise area, applied on a community-by-community basis since 1992, has required locally responsible, elected public officials and the competitive provider to negotiate construction schedules and build-out terms and conditions acceptable to both – each of which, obviously, approach resolution of these issues from starkly different viewpoints, especially in communities with widely disparate socio-economic neighborhoods. Stepping back and tackling these same issues, not on community-by-community but on a regional, statewide or national basis not only removes locally responsible, elected public officials from the delicate decision-making involved regarding where and when competitive video service reaches into the particular neighborhoods they represent, if ever, [48]

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[47] . Municipalities across the country adapted to industry complaints that arbitrary deadlines for extending service to all franchise areas frequently uneconomical if technically feasible. Therefore, municipalities have accepted the use of density standards, which, for example, may require an operator to extend service to all areas adjacent to existing plant where there are 15 homes per mile – an industry standard for recovering the cost of broadband system construction. (Professor Hazlett says in Attachment to the Comments filed by Verizon that an overbuilder would prefer 20 homes per mile.) Density standards impose reasonable, flexible deadlines for offering service through a franchise area.

[48] . Consider, for example, how the negotiations with the competitive provider and the political decision-making over these issues may differ in an urban community with a strong

but defies creation of a fair and rationale regulatory or legislative solution, which does vest ultimate political responsibility with an some other elected regional, state or federal body and which might be acceptable to the telecommunications industry.

First, the outcome of the community-by-community franchising of Ameritech New Media vividly illustrates that leaving to industry discretion areas to be served, removes the important safeguard of public accountability from locally responsible, elected public officials without placing it with any state or federal government regulators or elected officials. The voters of Detroit, Pontiac, Ecorse, River Rouge and Inkster had no where to complain when they were getting by-passed by the wholly-owned subsidiary of their incumbent telephone service provider, Ameritech, which was subsequently acquired by SBC and now serves these same communities as AT&T. Unless the FCC or the U.S. Congress adopt build-out and density requirements across entire SMSAs, DMAs or Congressional Districts, and unless the FCC or the U.S. Congress also accepts full public responsibility and accountability for the consequences of doing so, the pattern of communities gaining the benefit of competitive video service providers using the public rights-of-way will for many years certainly look very much like what shamefully happened

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mayor, four council members elected from wards and three council members elected at large from a rural community with seven officials all elected at large, four of whom live in the one new and wealthy, political active subdivision and three of whom are farmers from the geographically much larger but much less populated rural area.

in southeastern Michigan in the late 1990s – where many of the haves were separated from all of the have-nots.

IV. VERIZON'S ARGUMENTS AGAINST PEG CHANNELS, EQUIPMENT AND FACILITIES ARE PLAINLY WRONG UNDER THE 1984 CABLE ACT, AS AMENDED

A. Introduction

The Southeastern Michigan Municipalities also want to reply to comments from

Verizon, which asks the FCC to "adopt binding federal rules to enforce Section 621(a) and other related Cable Act provisions that place explicit limits on what may be required of a competitive provider as a condition of receiving a franchise. Moreover, the Commission should recognize that any effort [by local government] to impose added regulations – under the auspices of cable franchising authority – on the construction and operation of a national, mixed-use broadband network would violate federal law and policy and is preempted."

Verizon's begins its tortured legal arguments for new federal rules by describing what it believes a community may require under § 621(a)(4)(B) and § 622, with which we can agree, in large part. Then, however, Verizon launches into a jumbled series of complaints against (1) what it calls municipal pet projects, (2) demands for the reimbursement of outside legal and consulting services incidental to the awarding of a franchise, (3) efforts by some communities to include non-cable television related revenue within gross revenues upon which franchise fees are paid, and (4) demands for PEG channel, facility, equipment, support and institutional networks.

B. Municipal Pet Projects – A Red-Herring for the Headlines

The very few so-called municipal pet projects that we found in our review of the Comments filed by Verizon and all other competitive providers do not single out and identify any community involved, as they should have, in make such frivolous demands, which render these complaints highly suspect. Furthermore, obviously, as otherwise argued by Verizon and the other telecommunications companies, they are only seeking franchises to provide competitive video services in areas where it they already occupy the public rights-of-way, offering telecommunications services under statewide or local franchises for many years. As telecommunication industry was deregulated and competition ratcheted-up over the last decade, many issues have arisen between municipal officials and Verizon, AT&T and other the other ROBCs, which the old statewide or local franchises rendered difficult to resolve, *i.e.,* getting maps of existing overheard and underground lines and capabilities today needed for planning and economic development programs, relocating poles and lines owned by them when required by public improvement projects and many other day-to-day matters. It ought to be understandable if municipal officials bring any pending side issues up when these companies seek competitive video service franchises.

C. Outside Attorney and Consultants Level the Playing Field

Furthermore, we disagree with Verizon's legal arguments against being required to reimburse reasonable expenses incidental to the awarding of franchises. First, Verizon is plainly wrong on the law. Consistent with the FCC's long-standing practice prior to the 1984 Act, payments toward all reasonable costs of municipalities involved in the franchising process itself do not count against the 5 percent franchise fee limitation. Second, a distinction must be drawn between communities doing so and others that Verizon describes, without specially naming, demand excessive and arbitrary application or acceptance fees, even to commence franchise negotiations. Third, it is disingenuous for Verizon to argue that while some communities "have no problem negotiating a franchise in-house, many LFAs have brought in outside firms of attorneys or consultants whose main purpose is to extract as much value from the franchise applicant as possible, without regard to the costs such practices have on the viability of competitive entry." [49] The

[49] . Southeastern Michigan Communities should comment briefly that they agree with the former and disagree with the latter because enjoying the former requires satisfying the latter. A successful negotiation from the standpoint of outside attorneys and consultants ends with a franchise agreement in hand that does not leave any money on the table. Telecommunications industry bargainers for Verizon certainly understand this basic principle of business practice, well-illustrated by the experience of communities in

plain fact of the matter is that Verizon's professional staff and its outside counsel (two outside firms participating in drafting and researching its Comments) are daily dealing with the highly sophisticated and specialized issues of cable television technology and the complex interweaving of federal, state and law local regulating cable television system franchising. Primarily because most existing cable television franchises are granted for 15-year terms, most elected local mayors and council members holding office today have never been involved in awarding a cable television franchise. For the same reason, very few appointed local government managers and administrators have any experience negotiating and drafting cable television franchises. Moreover, finally, the decision to hire and the cost of bringing in an outside attorney is a matter of purely local community judgment and professional responsibility *completely* outside the preview of the FCC or anyone else.

D. Verizon's Hidden Agenda Regarding Non-Cable Related Fees

Verizon's complaint about one or more communities asking that non-cable related revenues be included in gross revenues subject to franchise fees curiously never even mentions *National Cable & Telecommunications Association v. Brand X Internet Services*, 125 S. Ct. 2688 (2005). While we

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southeastern Michigan, which tried but failed to reach agreement on competitive franchises with Ameritech New Media as described above.

cannot disagree that the cable television franchise fees are limited to 5 percent of gross revenues derived from the use of a cable system to provide cable service and that revenues derived from the use of a cable system to provide telecommunications and interstate information services come within that limitation, however, Verizon makes a very broad brush argument here, anticipating, perhaps, further technological developments or changes in the federal law, when it asks the FCC to issue a ruling preempting all fees from non-cable services or they are actually making a much too-clever argument against existing or possible fees related to the use of its wires to provide telecommunications services. In Michigan, for example, under the Metropolitan Extension Telecommunications Rights-of-way Oversight ("Metro") Act, Public Act No. 48 of the Public Acts of 2002, MCL 484.3101 *et seq.*, Verizon pays a right-of-way fee of up to 5 cents per linear foot of public right-of-way occupied by its telecommunications facilities. That right-of-way fee (and a one-time per community application fee of $500) does not come within the 5 percent limitation applicable to cable television franchise fees.

E. PEG Obligations in a Competitive Marketplace

The PEG-related experience of Southeastern Michigan Municipalities with the complications arising from a competitive provider are worthy of repeating in response to Version's arguments about permissible PEG obligations. In connection with that discussion, we should first offer a few words about level playing field requirements. In Michigan, there is no statewide level playing field statute. Some franchises include language, which rather than obligate municipal officials to demand the wholesale acceptance of the incumbent operator's franchise, including PEG-related requirements, instead, entitle the incumbent operator to adopt any less burdensome or more favorable provisions of any franchise awarded to a competitive provider. [50] While such level playing field requirements put pressure on municipal officials, they provide no basis upon which to deny a competitive franchise under §611. [51]

Initially, there arises a fundamental question when a competitive provider makes application to a community for a cable television franchise and the PEG-related arguments made by Verizon, which was the subject of an earlier rulemaking by the FCC.

In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996 Open Video Systems, Third Report and Order and Second Order on Reconsideration, FCC 96-334, CS Docket No. 96-46 (Released August 7,

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[50] . We will leave for another day the many possible arguments over how these kinds of statutory and franchise requirements should be interpreted if, for example, a competitor serves only some part of a community. They raise myriad other legal issues, which cannot adequately be addressed here.

[51] . For example, if an incumbent operator is providing PEG operating support to a third-party access center under a negotiated franchise, and a competitive provider refuses to do so, the community cannot reasonably refuse to grant a franchise, which otherwise satisfies local cable television related needs and interests, even if doing so would allow the incumbent operator to cease paying PEG operating support and adopt whatever alternative was granted to the competitive provider.

1996). In this proceeding, the FCC addressed some of these issues against the backdrop of its earlier ruling preempting local franchising of open video systems, which was reversed by the U.S. Court of Appeals for the Fifth Circuit in *City of Dallas v. FCC.* [52] Therefore, most of the conclusions the FCC reached in 1996 are inapplicable to competitive cable television franchising under §621. However, the Third Report and Order and Second Order on Reconsideration may be instructive of some of the practical problems and public policy issues today faced by municipalities, incumbent operators and competitive providers.

In 1996, the FCC decided that open video system operators are be required to provide PEG channel capacity "no greater or lesser" than those imposed on cable operators – but without denying communities, which, for whatever reason, had no PEG channels any opportunity to re-consider that decision, which, for example, might have been made 15 to 30 years ago by entirely different locally elected officials under a different form of municipal government. The FCC also applied a matching principle to PEG capital contributions, both cash grants and depreciated or amortized in-kind contributions (e.g., cameras and production studios). The FCC also ordered local cable operators to permit open video systems to connect with PEG channel feeds.

[52] . 165 F.3d 341 (5th Cir. 1999) (Nos. 96-60502, 96-60581, 96-60844) *reh'g and suggestion for reh'g en banc denied* (May 28, 1999).

None of these OVS rules applied in the context of Ameritech New Media's applications for competitive cable television franchises. However, what happened may be instructive. Ameritech New Media offered to provide no more than three PEG channels so that it could offer a uniform channel line-up across the 42 communities in which it sought franchises and completed construction. This raised significant objections in some communities, most of which were resolved by Ameritech New Media's willingness and ability to design its system so that single communities served by multiple school districts could offer one educational access channel that each school district used to cablecast programming only to viewers within its geographic area only. [53]

Most of the incumbent cable television franchises lacked any default mechanism by which either local municipal officials or Ameritech New Media could require interconnecting PEG channel feeds originating on property owned or leased by the incumbent cable operator, *i.e.,* a public access studio or a cable system headend to which taped programming was being delivered

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[53] . This approach, of course, would not protect communities such as East Lansing, Michigan, where, for example, the City, a neighboring township, two school districts, a major public university and a community college have cablecast programming throughout the City on their own channels for many years. Nor does it protect a fourth or more channels set aside for religious programming, for example, such as in Dearborn Heights, which was actively being used. There, the City decided to forego a public access channel on Ameritech New Media's system. Furthermore, most of the incumbent cable systems in southeastern Michigan were originally designed on a community-by-community basis – each was served with its own headend. PEG channel feeds were wired back to those many headends. As systems consolidated over the last 25 years, most of those headends were closed and replaced by community-by-community hubs. However, there remained many situations in which existing system architecture and the cost of rewiring discouraged the incumbent cable operators from geographically isolating PEG channel feeds.

by public access producers or by municipal officials for playback. Most of these PEG feed problems were eventually resolved between the incumbent operator and Ameritech New Media. Others were resolved in later franchise renewal negotiations with the incumbent operator. Some interconnection situations stymied negotiations with Ameritech New Media, where, for example, the incumbent cable operator, Comcast, funded a community programming channel operated by a non-profit third party, which was barred by agreement from making its feed available for carriage on a competitive system. [54]

Verizon's complaint about communities demanding that it match the incumbent operator's PEG contributions were resolved, for the most part, between the Southeastern Michigan Municipalities and Ameritech New Media by agreement to a one-time cash grant for PEG equipment and facilities and ongoing PEG support of up to 1 percent of gross revenues. [55] This, however, as described above, rendered negotiations in other

[54] . Grosse Pointe, Grosse Pointe Farms, Grosse Pointe Park, Grosse Pointe Woods, Grosse Pointe Shores and Harper Woods. *See also* Verizon's complaints about its PEG channel interconnection experience with incumbent cable operators. If any rule ought to be issued in this proceeding, PEG channel interconnection is an area, which the FCC should address as it did in the OVS rulemaking.

[55] . With many exceptions, the franchises held by incumbent cable operators had also required a one-time grant, in some cases required the staffing of a studio and the availability of portable equipment for public access but no other cash operating support for PEG.

communities very difficult, where the incumbent operator was obligated to spend significantly more in support of PEG programming. [56]

The FCC's matching principle approach to PEG contributions directly answer's Verizon's objection that "in the vast majority of cases, the facilities and equipment needed to develop PEG programming . . . have already been deployed, and are not even being used to their capacity." [57] Verizon asks the FCC to hamstring the requirements of § 624(a)(1) that communities may "establish requirements for facilities and equipment" in granting a new cable television franchise by what it argues is the limiting language of § 611(c), that allows such requirements to be enforced if "proposed by the cable operator" and by the language of §621(a)(4)(B) which allows municipal officials to require only "*adequate assurance* that the cable operator will provide adequate [PEG] access channel capacity, facilities or financial support." (Emphasis Added.) This is an awfully erroneous and wrongheaded reading of these provisions. § 611(c) and § 624(a) (2)(A), plainly allow municipal officials to enforce not only PEG channel, equipment and facilities that it can *require* under § 611(b) but also those which a cable operator

[56] . Typically, this occurred in communities where the entire 5 percent franchise fee went into the general fund and the cable operator was funding the entire cost of public and, in some cases, governmental access programming.

[57] . Verizon's complaint completely ignores cases in which PEG operations are completely or partially managed by incumbent cable operators, who would suggest that managing PEG operations involves not only tangible but significant intangible costs, some would prefer to avoid, *i.e.,* PEG managers who are good at what they do are not only talented, creative people, frequently bringing, new and costly ideas to local management and but they are also often in search of the next job in the broadcast industry.

voluntarily offers and which are incorporated into a cable television franchise, *i.e.,* operating support for a third-party PEG access center. [58]

Verizon makes equally erroneous and wrongheaded arguments, already rejected by the FCC in its Third Report and Order and Second Order on Reconsideration in the open video service rulemaking, against ever being required to provide more PEG channel capacity or facility or equipment support than that required from the incumbent cable operator. The assumption underlying Verizon's arguments is proceeding is that future cable television needs and interests were forever frozen once a community reached agreement with its incumbent cable television operator. To the contrary, in Third Report and Order and Second Order on Reconsideration, the FCC decided that communities should be able re-consider PEG obligations every 15 years. The Southeastern Michigan Municipalities argue, however, that communities asked to award a competitive cable television franchise are always able to re-consider PEG obligations subject to the reasonableness standard of § 621.

Verizon's objections against I-Net requests are plainly wrong. Its complaints defy comparison against what it offers up with what the 1984 Act has propelled. What the federal law allows municipalities to require of any

[58]. These provisions of the federal law arise from the active lobbying of the cable television industry in the years and months before the U.S. Congress adopted the U.S. Cable Communications Policy Act of 1984. They not only got renewal protection in the 1984 Cable Act but shielding from demands for PEG operating support in contested, formal renewal proceedings. Nonetheless, the U.S. Congress, the cable television industry and municipal officials recognized by these tightly inter-related provisions that voluntarily offered PEG operating support incorporated into an informally negotiated new or renewed franchise can and should be subject to enforcement.

cable television provider cannot be contested by Verizon, which makes an argument which turns inward upon itself -- that municipal official cannot demand I-Net capacity for educational and governmental access use unless there are any existing I-Nets upon which there is any capacity. The system Verizon proposes to install very precisely fits the definition of an institutional network as well as a residential cable television system. Therefore, Verizon's argument that the I-Net requirement, if any, only applies to incumbent cable television operators, relying on *City of Dallas v. FCC* fails on that fact alone. It's absurdly simple-minded objection ignores the statutory authority of municipal official to require PEG channel capacity to be set aside in a new cable television franchise not only for the cablecasting of public, educational and governmental video programming but also to require the construction of institutional capacity for other educational and governmental uses, too, under §611(b), (f) . The Verizon argument offends reasonable legislative interpretation. [59] This issue needs very carefully to be addressed in this

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[59] . Verizon, sort of, tries to shoehorn this argument against what the Southeastern Michigan Municipalities accept and that almost all municipal-related Comments have accepted in what has been filed – that the provision of an I-Net does not mean LFAs can require the provision of free or discounted high-speed Internet broadband or other telecommunications services on the dark capacity set aside. The cable television industry has already honed this argument finely in franchise renewals over the last 10 years. However, the Southeastern Michigan Municipalities vigorously argue that they could have and can require a set aside of capacity for educational and governmental uses*, i.e.,* even if they cannot offer services themselves which violate the boundary between generally recognized governmental and proprietary or commercial functions. Neither the U.S. Congress nor the FCC has ever tried to tell municipalities how they can use set-aside PEG capacity, even if, for example, PEG channels offer commercial advertising. The FCC cannot and should not attempt to decide in this proceeding what can done on an I-Net under a cable television franchise absent a distinct rulemaking because these issues are barely addressed in the NPRM. Moreover, the NPRM did not address the issue of existing franchises that, today, are used to reach other governmental and educational users or even cable television subscribers reached through I-

proceeding because I-Net requirements of cable television franchises have never been limited to PEG feeds and because the U.S. Congress never so decided that the FCC could decide that I-Nets using the public rights-of-way incorporated into thousands of municipal franchise should not or cannot be used for all the possibilities that technology make available ever day. Verizon goes on at futile length that this I-Net requirement of federal law only applies to channel capacity on such a network that Verizon *voluntarily* agrees to build. Verizon can today provide all of these services, so regardless, its build-out argument fails to be convincing.

CONCLUSION

The FCC need to fully appreciate that this NPRM threw a monkey-wrench into all pending cable television franchise renewals, regardless of whatever the U.S. Congress might do. This highly regrettable direct consequence of the FCC's decision to issue this NPRM was given no comment by any telecommunications or cable television company in the review of filing made by the Southeastern Michigan Municipalities.

Nets by municipalities and PEG programmers to deliver video programming such as VOD and interactive and other services that include streamed video programming. The possible uses of I-Net capacity are so big already that any FCC intrusion into what has already been put into place by municipalities, PEG programmers and cable television companies as well as those services being offered by other competitive providers would be unnecessarily destructive.

Some Southeastern Michigan Municipalities tried to engage the FCC's cable television rate regulations beginning September 1993. They adapted and re-adapted to ever-changing rules and procedures made by the FCC and, finally, in 1996, suffered the elimination of any effective role they might ever have over cable television rates, [60] even while municipalities here and across the country waited many years for FCC decisions on the inevitable cable industry appeals to every earlier local rate decision. [61] Our experience with FCC cable television rate regulation puts us into the position of either criticizing the agency seeking our comments and reply comments in this proceeding or sitting back in angry silence. We choose the former only by way of a making a hopeful plea that the FCC will act expeditiously on this NPRM. The implication of the FCC's failure to expeditiously handle rate regulatory

[60] . If a cable operator can increase rates for non-regulated cable television services, and does so, in response to any pending or future rate ruling for the basic service, equipment, installation and service charges, how can the U.S. Congress, the FCC or any LFA justify what they did before or ever trying to enforce basic service regulation for the very few subscribers who today subscribe only to basic service? Moreover, the Southeastern Michigan Municipalities are flabbergasted that the FCC has never issued a NPRM to ask comment on its handling of basic cable television service rate disputes and the adoption of new, streamlined procedures to expedite their review given the FCC's dismal record of doing so since 1993. Instead, the FCC has expedited the review of effective competition petitions by the cable television industry in a concentrated effort to bring an end to any regulation of all cable television rates.

[61]. A review of records at the FCC will find that few of the 42 rate regulation certified communities served by WOW in southeastern Michigan have ever formally been declared as being subject to effective competition. The incumbent cable television operators here apparently decided that they could ignore required rate regulatory filings in those many communities that had earlier certified to regulate rates since, once Ameritech New Media, started offering service, which they might do so successfully. Notwithstanding the apparent legal limbo, which exists, doing so might have required that they provide information useful to WOW regarding penetration rates and they might have discovered that some communities were not subject to effective competition, i.e., Fraser. Almost uniformly, these communities remain legally certified to regulate basic service rates and neither WOW nor Comcast makes any filings required under federal law.

appeals by the cable television industry carries over indirectly into this NPRM. So long as this proceeding remains open, all expired and pending cable television renewals likely will remain expired and pending in all community's where the incumbent cable operator feels threatened by competitive entry

or municipal officials are getting good legal advice. An expeditious report is certainly required if the FCC is going to achieve what it says it intended in issuing the NPRM.

Respectfully Submitted,

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